

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

**JACK CIOCCA,**

**Petitioner,**

**v.**

**UNITED STATES OF AMERICA,**

**Respondent.**

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**CIVIL NO. 3:CV-05-1563**

**(Judge Caputo)**

**M E M O R A N D U M**

**I. Introduction**

\_\_\_\_Petitioner, Jack Ciocca, a federal prisoner confined at the United States Penitentiary in Lewisburg (USP-Lewisburg), Pennsylvania, commenced this action, through counsel, with petition for writ of habeas corpus filed pursuant to the provisions of 28 U.S.C. § 2241. The appropriate filing fee has been paid in full. Named as Respondent is the United States of America.<sup>1</sup> Petitioner claims that he has discovered evidence that discredits the testimony of a key prosecution witness at his trial, and that Petitioner's sentence should be vacated or modified without reliance on the discredited testimony.

**II. Background**

Petitioner was convicted in the United States District Court for the District of Maine ("Maine District Court") for the offenses of: (1) conspiracy to distribute and possess with intent to distribute more than 500 grams of cocaine, and (2) possession with intent to distribute more than 500 grams of cocaine and aiding and abetting same. (Doc. 1 at 2.) As

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<sup>1</sup>Although Petitioner, a federal prisoner, is technically detained by the United States of America, the proper Respondent in this action would be the "warden of the facility where the prisoner is being held, not . . . some other remote supervisory official." *Rumsfeld v. Padilla*, 124 S.Ct. 2711, 2718 (2004).

a result of the conviction, Petitioner was sentenced on March 26, 1996, to a term of imprisonment of 188 months, followed by eight (8) years supervised release, and a fine of \$75,000.00 was imposed. (*Id.*) Subsequently, Petitioner filed: (a) two (2) motions to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 in the Maine District Court; (b) motions for recusal and new trial in the Maine District Court; (c) a motion for re-sentencing in the Maine District Court; (d) a petition for writ of mandamus in the Maine District Court; (e) an application to file a second or successive motion to vacate, set aside or correct sentence in the United States Court of Appeals for the First Circuit; and (f) a petition for writ of habeas corpus under 28 U.S.C. § 2241 in this Court. (Doc. 1, Attachment 1 at 1.) All of these actions were denied. (*Id.* at 2.) Subsequently, Petitioner filed the instant petition on August 4, 2005. For the reasons that follow, the Court finds that § 2241 relief is unavailable to Petitioner, and will summarily dismiss the petition.

### **III. Discussion**

Habeas corpus petitions brought under § 2241 are subject to summary dismissal pursuant to Rule 4 (“Preliminary Consideration by the Judge”) of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254 (1977) (applicable to § 2241 petitions under Rule 1(b)). See, e.g., *Patton v. Fenton*, 491 F. Supp. 156, 158-59 (M.D. Pa. 1979). Rule 4 provides in pertinent part: “If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified.” A petition may be dismissed without review of an answer “when the petition is frivolous, or obviously lacking in merit, or where . . . the necessary facts can be determined from the petition itself . . . .” *Allen v. Perini*, 424 F.2d

134, 141 (6th Cir.) *Accord U.S. ex rel. DeCreti v. Wilson*, 967 F.Supp. 303 (N.D.Ill. 1997).

The *Allen* court also stated that “the District Court has a duty to screen out a habeas corpus petition which should be dismissed for lack of merit on its face.” 424 F.2d at 141.

Generally, a challenge to the validity of a federal conviction or sentence must be brought in a §2255 motion. *See United States v. Miller*, 197 F.3d 644, 648 n.2 (3d Cir. 1999). Thus, the Petitioner’s proper avenue of relief is a section 2255 motion, filed in the district court where he was convicted, *see United States v. Hatcher*, 76 F. Supp. 2d 604 (E.D. Pa. 1999), unless the Petitioner can show that the remedy under section 2255 would be “inadequate or ineffective to test the legality of his detention.” 28 U.S.C. § 2255 (West Supp. 2000); *see also United States v. Brooks*, 230 F.3d 643, 647 (3d Cir. 2000).

The Third Circuit Court of Appeals has stated that such inadequacy or ineffectiveness is present, thereby allowing a § 2241 petition to substitute for a § 2255 motion, only where it is established “that some limitation of scope or procedure would prevent a Section 2255 proceeding from affording the prisoner a full hearing and adjudication of his claim of wrongful detention.” *Brooks, supra*, 230 F.3d at 648 (quoting *United States ex rel. Leguillou v. Davis*, 212 F.2d 681, 684 (3d Cir. 1954)). “It is the inefficacy of the remedy, *not a personal inability to utilize it*, that is determinative . . . .” *Garris v. Lindsay*, 794 F.2d 722, 727 (D.C. Cir. 1986) (emphasis added). Petitioner has the burden of proving that section 2255 would be an inadequate or ineffective remedy, *Reyes-Requena v. United States*, 243 F.3d 893, 901 (5th Cir. 2001) (citing *Pack v. Yusuff*, 218 F.3d 448, 452 (5th Cir. 2000)), and section 2241 should not be used as a way of evading the gatekeeping provisions of section 2255. *In re Dorsainvil*, 119 F.3d 245, 251 (3d Cir. 1997).

Petitioner has filed two (2) motions under § 2255, he has sought permission to file a further § 2255 motion, and he has been denied. Since he has sought such permission, and been denied, the Court must dismiss the present petition under 28 U.S.C. § 2244(a).<sup>2</sup> At best, Petitioner has only demonstrated a personal inability to utilize the § 2255 remedy a again, because of the gatekeeping provisions in that section.<sup>3</sup> Nothing in the instant petition establishes the inadequacy or ineffectiveness of the remedy. Since section 2255 is not inadequate or ineffective to test the legality of Petitioner's detention or sentence, the Court will dismiss this 2241 petition under Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts. An appropriate order follows.

Dated: August 29, 2005

\_\_\_\_\_/s/ A. Richard Caputo

A. RICHARD CAPUTO

United States District Judge

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<sup>2</sup>28 U.S.C. § 2244(a) states:

"No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in Section 2255."

<sup>3</sup>28 U.S.C. § 2255 states in pertinent part:

"A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain —  
(1) newly discovered evidence . . . or  
(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court . . . ."

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**(Judge Caputo)**

**ORDER**

**AND NOW, THIS 29<sup>th</sup> DAY OF AUGUST, 2005,** in accordance with the foregoing memorandum, **IT IS HEREBY ORDERED THAT:**

1. The petition for writ of habeas corpus under 28 U.S.C. §2241 (Doc. 1) is **DISMISSED** without prejudice to any right Petitioner may have to move the appropriate court of appeals for an order authorizing the district court to consider a successive § 2255 motion pursuant to 28 U.S.C. § 2244(b)(3)(A).

2. The Clerk of Court is directed to **CLOSE** this case.

3. There is no basis for the issuance of a certificate of appealability.

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/s/ A. Richard Caputo

A. RICHARD CAPUTO

United States District Judge